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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, *et al.*,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief *Amici Curiae* of the
ALLIANCE OF AUTOMOBILE MANUFACTURERS,
AMERICAN IRON AND STEEL INSTITUTE,
CHAMBER OF COMMERCE OF THE UNITED STATES,
ENVIRONMENTAL MANAGEMENT ASSOCIATION OF SOUTH CAROLINA ,
ENVIRONMENTAL TECHNOLOGY COUNCIL,
MICHIGAN MANUFACTURERS ASSOCIATION,
NATIONAL ASSOCIATION OF MANUFACTURERS,
SOUTH CAROLINA CHAMBER OF COMMERCE
and the
SOUTH CAROLINA MANUFACTURERS ALLIANCE

IN SUPPORT OF RESPONDENT

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and the
SOUTH CAROLINA MANUFACTURERS ALLIANCE

IN SUPPORT OF RESPONDENT

This brief *amici curiae* of the Alliance of Automobile Manufacturers, *et al.*, is submitted in support of Respondent Laidlaw Environmental Services (TOC), Inc. (Laidlaw).[1]

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amici curiae* and their members made a

This case involves a private enforcement action filed by Petitioners Friends of the Earth, *et al.* (FOE), pursuant to section 505 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365. In an opinion issued July 16, 1998, the United States Court of Appeals for the Fourth Circuit ruled that FOE's suit against Laidlaw was moot and remanded the case to the district court with instructions to dismiss. 149 F.3d 303, 307. The Fourth Circuit correctly ruled that this case is moot, and *amici*, like Respondent, submit that the court of appeals' judgment should be affirmed.[2]

Laidlaw achieved compliance a number of years ago with the Clean Water Act requirements that formed the basis for FOE's lawsuit, and there is no reasonable expectation that the matters of which FOE complained in 1992 could reoccur. It bears particular emphasis that Laidlaw's compliance with the Act was the combined result of two factors: (i) Laidlaw's own concerted efforts to achieve compliance, which were undertaken in close coordination with the South Carolina Department of Health and Environment Control (DHEC) and prior to and entirely independent of FOE's lawsuit; and (ii) a change in law -- the correction by DHEC of an unduly stringent surface water discharge limit for mercury that was

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monetary contribution to the preparation or submission of this brief. The Petitioners and Respondent have consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

[2] The industrial facility at issue in this case has been permanently closed. In view of the plant closure, Respondent filed a Suggestion of Mootness with the Court on June 9, 1999, which remains pending at this time. While *amici* believe that Laidlaw's Suggestion of Mootness should be dispositive, *amici's* interest in this case transcends the plant closure. Thus, the perspective from which *amici* address the issues before the Court is that independent of the plant closure, this case became moot (i) as a result of FOE's failure to appeal the district court's denial of equitable relief, or (ii) alternatively, as a result of Laidlaw's compliance with the Clean Water Act.

repeatedly described by the trial court as "drastic" and "draconian."[3]

In addition, *amici* submit that an important aspect of the context in which this case arises, and a significant factor in *amici's* interest in the case, is the longstanding recognition by this Court and other courts that primary responsibility for enforcement of the Clean Water Act is vested in the states. *See EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 207-08 (1976). In contrast, private enforcement suits under section 505 of the Clean Water Act, such as FOE's suit here, were intended to serve a supplementary role if government agencies fail to exercise their enforcement responsibility. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). In derogation of these principles, FOE's enforcement suit represented a duplicative and unnecessary action contrary to the efforts of the regulated entity and the responsible state agency, as well as the public interest. *See ibid.* Simply put, Laidlaw found itself in the unenviable position -- a not uncommon position for major industrial facilities -- in which a Clean Water Act permit condition has proven to be unduly stringent and is subsequently modified. The interposition of FOE's lawsuit reflects a frequent pattern in such circumstances where duplicative citizen suits ride the coattails of state enforcement and unnecessarily burden the federal courts as well as defendants. These matters are of considerable concern to *amici* and are especially compelling in this case where more than seven years ago Laidlaw put in place the requisite measures to reduce mercury discharges (which had been the basis for FOE's lawsuit) to levels that consistently achieved the discharge limits finally established for the facility at issue. In short, this case is moot and was properly dismissed.

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[3] DHEC is the agency of state government responsible for implementation and enforcement of the Clean Water Act in South Carolina.

STATEMENT OF INTEREST OF *AMICI*

As further described below, a*mici* consist of voluntary business and professional associations representing a broad spectrum of industry in the United States. *Amici's* members hold thousands of surface water discharge permits which, like the permits underlying this case, have been issued pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342. *Amici* and their members are committed to the goals of the Act, and to that end *amici's* members spend vast sums, in coordination with state and federal regulatory authorities, to upgrade and enhance water pollution control at their industrial facilities.

The Alliance of Automobile Manufacturers (Alliance) is a voluntary non-profit trade association of domestic (United States) and international companies engaged in the manufacture and sale of automobiles and light trucks. The Alliance's members' operations in the United States encompass 255 manufacturing facilities and approximately 600,000 employees. In addition, Alliance members represent more than 90% of motor vehicle sales in the United States.

The American Iron and Steel Institute (AISI) is a trade organization representing North American manufacturers, processors and other producers of iron and steel and related products. Virtually every domestic member of AISI is subject to regulation under the Clean Water Act and parallel state laws. AISI's 50 member companies represent approximately 70% of steel production in the United States. AISI represents the views of its members before courts and regulatory agencies on issues of law and public policy that are of significant concern to them.

The Chamber of Commerce of the United States (Chamber) is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector and region. Ninety-six percent of the Chamber's members are businesses with fewer than 100 employees. The Chamber regularly advocates the interests of its members in

court on environmental issues of national concern to the business community.

The Environmental Management Association of South Carolina (EMA) is an association of environmental professionals from South Carolina industry formed to promote responsible waste management practices for protection of the environment. EMA serves its members' communities and businesses through participation in regulatory and legislative initiatives, educational programs and other public advocacy.

The Environmental Technology Council (ETC) is a non-profit corporation which serves as a national trade association for commercial firms that provide technologies and services for the recycling, treatment and secure disposal of industrial and hazardous wastes. ETC's membership also includes companies involved in the cleanup of contaminated industrial sites.

The Michigan Manufacturers Association (MMA) is a business association of private Michigan employers studying matters of general interest to its members, promoting their interests and the interests of all Michigan employers and the general public in the proper administration of laws relating to its members, and otherwise promoting the general business and economic welfare of Michigan. MMA's more than 4,000 members employ 90% of the industrial work force in Michigan -- over one million people. An important aspect of MMA's activities is representing its members as an *amicus curiae* in a broad range of matters before the courts.

The National Association of Manufacturers (NAM) is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM

through its Associations Council and National Industrial Council.

The South Carolina Chamber of Commerce is the state's largest broad-based association of business and industry. Operating as a statewide organization with more than 2,400 members, the South Carolina Chamber represents businesses, industries, professions and associations of all sizes and types. The South Carolina Chamber serves as a forum for consensus building to facilitate presentation of a unified viewpoint on a broad range of public policy and regulatory matters before legislative, regulatory and judicial forums. The South Carolina Chamber works actively to maintain the state's positive business climate while at the same time enhancing the quality of life for all South Carolinians.

Finally, *amicus* South Carolina Manufacturers Alliance (SCMA) represents more than 80 companies and over 140 industrial facilities in South Carolina. In addition, SCMA members employ more than 80,000 South Carolinians in the manufacture of a wide variety of products. SCMA works closely with state and federal regulatory agencies to provide information, guidance and leadership in the development of laws, regulations and policies regarding environmental protection in South Carolina. SCMA's environmental committee consists of the state's leading scientists and engineers, who have responsibility for environmental management and compliance at their respective companies. SCMA promotes sound engineering, science and economics in both legislative and regulatory processes.

STATEMENT OF THE CASE

The underlying facts and procedural history are fully set forth in Respondent's brief (as well as the district court's decisions), and *amici* address only those facts that have particular relevance to *amici's* arguments in support of Respondent.

When this suit was filed in June 1992, and for several years thereafter, Respondent owned and operated a hazardous waste incineration facility in Roebuck, South Carolina. Wastewater from the air pollution control system for the incinerator was directed to an onsite wastewater treatment plant and discharged to the North Tyger River pursuant to a National Pollutant Discharge Elimination System (NPDES) permit that had been issued to Laidlaw's predecessor by DHEC.[4] Soon after Laidlaw purchased the facility, DHEC issued a new NPDES permit, effective January 1, 1987, containing a number of more stringent effluent limits. The most significant reduction was the effluent limit for mercury, which was reduced from the previous daily maximum discharge concentration of 20 parts per billion (ppb) to 1.3 ppb.

Recognizing that it had imposed a drastic and potentially unattainable reduction in the discharge limit for mercury, DHEC required a feasibility study of possible mercury control technologies and included a permit "reopener" clause if the new limit proved unattainable. The feasibility study was completed by a consulting engineering firm and evaluated eight possible alternative technologies. Initial testing of one of the eight alternatives (carbon adsorption) appeared promising, and as a result Laidlaw chose not to avail itself of the permit reopener clause in order to seek a less stringent mercury limit. J.A. 142-44. DHEC subsequently approved installation of the carbon adsorption technology. Nevertheless, the feasibility study concluded that complying with the 1.3 ppb limit would be extremely difficult and

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[4] The 1972 amendments to the Clean Water Act established the NPDES program, which is based on a system of permits that regulate the discharge of pollutants to navigable waters of the United States. The permit program is administered by the U.S. Environmental Protection Agency and the various states, including South Carolina, to which administration of the program has been delegated. *See* § 402 of the Act, 33 U.S.C. § 1342; *see also EPA v. California*, 426 U.S. at 205-08.

complex given that all available information from manufacturers and performance results for currently available technology indicated that the 1.3 ppb limit was not achievable. J.A. 143.

Unfortunately, the carbon adsorption technology did not allow Laidlaw to comply with the 1.3 ppb mercury limit consistently. It also presented some difficulty (substantially less) for other metals that were regulated under Laidlaw's NPDES permit. As a result, in September 1988 Laidlaw and DHEC entered an administrative order on consent that required further evaluation of control technology alternatives. In accordance with a DHEC-approved compliance schedule, a new treatment technology, referred to as the Lancy system, was installed in late 1990/early 1991. J.A. 144-45. Although the Lancy system, a sulfide precipitation-filtration technology, achieved full compliance with all other effluent limits of the Roebuck facility's NPDES permit, compliance with the 1.3 ppb mercury limit continued to present difficulty, and by early 1992 DHEC officials began preparing an enforcement action against Laidlaw, which resulted in a consent decree entered in South Carolina state court. At the same time Laidlaw was continuing its investigation of alternatives for meeting the 1.3 ppb mercury limit. Through experimentation with use of activated carbon, micro-filtration and ion exchange, Laidlaw discovered that the addition of activated carbon to the end of the Lancy system would achieve compliance with the 1.3 ppb limit. J.A. 145-47, 155.[5] The district court commended Laidlaw's genuine efforts to achieve compliance, particularly given the highly restrictive nature of the 1.3 ppb mercury limit. J.A. 173-74.

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[5] As part of this effort, Laidlaw also severely restricted the feed rate of mercury-bearing waste to the Roebuck facility's incinerator. The district court, however, found no demonstrated relationship between reducing the mercury feed rate and compliance with the 1.3 ppb limit for mercury. J.A. 155, 174-76.

During this same period, and well before Petitioners' lawsuit, Laidlaw applied to DHEC for a new NPDES permit which would, among other things, correct the unduly stringent 1.3 ppb mercury limit.[6] In response, DHEC issued an amended permit in 1993 providing new permit limits for a number of pollutants, including mercury. J.A. 148. Laidlaw appealed the 1993 permit because it continued to contain erroneous requirements for mercury. First, the 1993 permit failed to include both daily maximum and monthly average mercury limits, even though NPDES regulations required such two-part limits in order to control both short-term (acute) and long-term (chronic) impacts on the receiving water. *Ibid.* Second, in determining the daily maximum -- or short-term -- component of the two-part limit, the 1993 permit had incorrectly relied on water quality criteria that are intended for use in determining longer term or chronic standards, such as a monthly average limit for mercury (monthly average limits are typically set at lower allowable pollutant concentrations in comparison to the somewhat higher pollutant concentrations that underlie short-term limits). The 1987 permit reflected the same shortcoming -- that is, the daily maximum or acute limit for mercury was determined by reference to water quality criteria that address chronic or long-term impacts.

To address these matters, DHEC agreed in 1994 to reissue the permit again and correct the permit's requirements for mercury. Specifically, the effluent limits for mercury in the 1994 permit consisted of a new daily maximum discharge concentration of 10 ppb and a monthly average concentration limit of 1.25 ppb. The district court summarized these changes in the new permit as follows:

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[6] Laidlaw's NPDES permit renewal was filed on December 31, 1991, four months before notice of intent to sue Laidlaw was issued by one of the Petitioners, *see* Clean Water Act, § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A), and six months before Petitioners commenced suit in June 1992.

> The 1994 Permit, therefore, significantly altered Laidlaw's discharge obligations in two respects: it established a monthly average where none had existed before, and it increased the daily maximum to more than seven times what it had been previously.

J.A. 148-49. The impact of these significant alterations to Laidlaw's discharge obligations is evident from the record. Appendix A to the district court's January 1997 opinion chronicles all of Laidlaw's mercury violations over the eight-year period from January 1987 through January 1995. Of the 489 mercury excursions shown, 92 percent (or 449) would not have been violations of the corrected limits for mercury in the 1994 permit. Within less than one week of the filing of this lawsuit in June 1992, and continuing until the Roebuck plant closed more than six years later, there were no discharge concentrations for mercury that exceeded the 10 ppb daily maximum limit of the 1994 permit.

Given Laidlaw's state of compliance, and the absence of any demonstrated harm to the environment, the district court imposed a civil penalty but denied in all respects Petitioners' request for an injunction and other equitable relief. J.A. 182-83. Although Petitioners appealed the district court's civil penalty determination to the Fourth Circuit, Petitioners did not challenge the district court's denial of equitable relief. In its opinion addressing Petitioners' appeal, the Fourth Circuit found Petitioners' relinquishment of their claim for equitable relief to be dispositive, noting that "[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw, which would be paid to the United States Treasury." 149 F.3d at 306. The court of appeals relied on this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), in which the Court ruled that civil penalties paid to the U.S. Treasury do not redress a private plaintiff's alleged injury for violation of environmental laws.

Id. at 1019. The court of appeals concluded that FOE's suit against Laidlaw had become moot because civil penalties payable to the government -- the only remedy available to Petitioners, given relinquishment of their claim for injunctive relief -- would not redress any injury FOE had suffered. 149 F.3d at 306-07. Accordingly, the court of appeals remanded the case to the district court with instructions to dismiss.

SUMMARY OF ARGUMENT

To satisfy the case-or-controversy requirement of Article III of the Constitution, a federal court litigant must have a personal stake in the outcome, which is a requirement throughout the litigation. In this case, however, Petitioners ceased to have a personal stake because they relinquished their claim for injunctive relief regarding the Clean Water Act violations at issue, and instead pursued only civil penalties (as well as attorneys' fees). This conclusion follows from the fact that civil penalty relief, which is directed solely to the United States Treasury, does not inure to the benefit of a citizen plaintiff. Having relinquished the only claim for relief which could provide the requisite personal stake, Petitioners' case became moot.

Alternatively, this case is also moot because there was no reasonable expectation (even before the Roebuck plant was permanently closed) that Laidlaw would again be in violation of its discharge permit. This follows from the fact that prior to and independent of FOE's lawsuit Laidlaw was already vigorously pursuing the requisite pollution control measures, and long ago achieved permanent and complete NPDES compliance.

Finally, the determination of mootness in this case will support, rather than conflict with, the congressional policies underlying the Clean Water Act. Consistent with Congress' intent that states have the primary role in enforcement of the Act, determination of mootness will properly recognize the unnecessary, counterproductive nature of duplicative citizen

suits that ride the coattails of successful compliance efforts by NPDES permittees and state regulatory authorities.

ARGUMENT

I. Given FOE's Abandonment Of Any Claim For Equitable Relief, The Fourth Circuit Correctly Determined That FOE's Appeal Was Moot, As Civil Penalties Alone Cannot Redress A Party's Alleged Injury For Purposes Of Article III Justiciability

Under Article III of the Constitution, federal courts may adjudicate only actual, on-going cases or controversies. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). To invoke Article III jurisdiction in the first instance, a litigant in federal court (i) must have suffered (or be imminently threatened with) an actual injury that (ii) is traceable to the defendant's activities and (iii) is likely to be redressed by the relief requested. *Steel Co.*, 118 S. Ct. at 1016-17. These three elements of injury in fact, causation and redressability form the "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and are the core of Article III's case-or-controversy requirement. *Steel Co.*, 118 S. Ct. at 1017.

The case-or-controversy requirement embodied in standing doctrine, and the three prerequisites to standing, must be met at every stage of review, not merely at the time suit is brought. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974); *Arizonans for Official English*, 520 U.S. at 67. If not, the case becomes moot. *Id.* at 74. Normally, a case is moot when the passage of time and intervening events have caused the case to lose "'its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract questions of law,'" *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)), or if the

parties no longer possess a "legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).[7]

For the purpose of the Court's mootness analysis in this case, the pertinent question is whether the Petitioners continue to have a genuine "personal stake" in resolution of the issues they have brought before the Court. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (at all stages the "parties must continue to have a 'personal stake in the outcome' of the lawsuit." (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983))). "[T]he Article III question is not whether the requested relief would [provide a benefit] to the world at large, but whether [the litigant itself] has a stake in that relief." *Lewis*, 494 U.S. at 479. The personal stake requirement has no exceptions. Kenneth C. Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 616-17 (1968).[8]

In this case, the Court has been asked to review the Fourth Circuit's decision to vacate as moot the imposition against Laidlaw of civil penalties payable to the U.S. Treasury -- relief in which Petitioners, as private parties, have no personal stake, as they do not receive payment. *Steel Co.*, 118 S. Ct. at 1018 (civil penalties paid to the Treasury do not redress private plaintiff's injury for standing purposes because mere gratification in seeing defendant punished and

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[7] The Court has described mootness as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1364, 1384 (1973)).

[8] The rule requiring litigants to have an "interest of their own at stake is applied so rigorously that it has been termed the 'one major proposition' in the law of standing to which 'the federal courts have consistently adhered . . . without exception.'" *United States Parole Comm'n*, 445 U.S. at 412 (Powell, J., dissenting) (quoting 35 U. Chi. L. Rev. at 617).

deterrence of future harm, if deemed sufficient, "would make the redressability requirement vanish"). Declaratory and injunctive relief, which were denied by the district court due to the absence of environmental harm and Laidlaw's well-established record of compliance, J.A. 182-83, arguably could have provided the requisite personal stake. Petitioners, however, abandoned their pursuit of equitable relief when they appealed the district court's civil penalty ruling but determined not to appeal the denial of an injunction. Clearly, a claim becomes moot if, as in this case, it is abandoned on appeal. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 199-201 (1988). Thus, in the absence of any request for relief that could conceivably redress Petitioners' professed injury, there was no longer any cognizable case or controversy properly before the Fourth Circuit.

The Court's per curiam opinion in *Ashcroft v. Mattis*, 431 U.S. 171 (1977), is very much on point. There the plaintiff filed suit, pursuant to 42 U.S.C. § 1983, against police officers responsible for the shooting death of his son, who was attempting to escape arrest. The plaintiff sought to recover damages, and also to obtain a declaratory judgment that the relevant state statute, which authorized the use of deadly force to apprehend felons, was unconstitutional. Finding that a defense of good faith had been established, the district court denied both forms of relief. The plaintiff appealed the denial of the declaratory judgment, but not the denial of damages. The plaintiff's failure to appeal the damages issue mooted not just the question of damages, but the entire case, because the plaintiff's remaining interest in the case -- that is, in a declaratory ruling as to the validity of the state statute -- had been reduced to a mere abstract, non-justiciable interest. In other words, the predicate for the plaintiff's action was the damages claim because it provided the personal stake in the outcome that is a prerequisite to standing. But having abandoned pursuit of damages, "[n]o 'present right' of [plaintiff] was at stake." *Id.* at 172.

In this case, as in *Ashcroft*, Petitioners abandoned the one form of relief that could provide them with standing, thereby mooting the case. Just as the decision not to appeal his claim for money damages divested the *Ashcroft* plaintiff of standing, Petitioners' decision not to appeal their claim for equitable relief divested them of standing in this case; and just as the "emotional satisfaction" the *Ashcroft* plaintiff expected to obtain from a declaratory judgment could not save his case from mootness, *id.* at 173, neither can the "psychic satisfaction" of seeing Laidlaw pay civil penalties to the Treasury save Petitioners' case from the same disposition. *Steel Co.*, 118 S. Ct. at 1019.

In this regard it bears emphasis that *Steel Co.* clearly held that civil penalties paid to the Treasury do not redress a private plaintiff's injury for purposes of Article III's case-or-controversy requirement. *Id.* at 1018. Petitioners and their supporting *amici* nevertheless misread that decision. They insist that the *Steel Co.*'s redressability holding is limited to instances where a claim is made to assess civil penalties for wholly past violations, and does not apply if violations are ongoing when suit is brought. *See, e.g.*, Pet'r Br. at 14-15, 20-22; Brief of the United States as *Amicus Curiae* (Gov't Br.) at 9, 13. To the contrary, *Steel Co.* makes clear that the reason civil penalties do not redress a private plaintiff's injuries is because the private plaintiff does not receive them. 118 S. Ct. at 1018.

Likewise, Petitioners and their supporting *amici* contend that pursuit of civil penalties in the absence of a claim for injunctive relief is sufficient to meet the redressability element of standing for Article III purposes because of the deterrent effect civil penalties may have when violations are ongoing at the time a suit is filed. *See, e.g.*, Pet'r Br. at 22; Gov't Br. at 25-27. While *amici* disagree that civil penalties would provide any deterrent under the facts of this case, the more significant point is that Petitioners' (and their *amici*'s) argument proves too much. Specifically, for purposes of Article III, the date of the complaint -- that is, whether there

are only pre-complaint violations -- has no significance: if the deterrent effect of a civil penalty is sufficient to meet the redressability element of standing in a case with post-complaint violations, then that same deterrent effect would also be sufficient in a case involving only pre-complaint violations. That is because the role of the penalty in encouraging compliance would be equally applicable in both situations. *Steel Co.*, however, makes clear that such deterrence does not satisfy the case-or-controversy requirement because in requesting civil penalties Petitioners

> seek[ ] not remediation of [their] own injury . . . but vindication of the rule of law -- the "undifferentiated public interest" in faithful execution of [the Clean Water Act]. This does not suffice. . . . [I]t is [not] enough that [Petitioners] will be gratified by seeing [Respondent] punished for its infractions and that the punishment will deter the risk of future harm. . . . Obviously, such a principle would make the redressability requirement vanish. . . . [A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

118 S. Ct. at 1018-19 (citations omitted).

In short, absent the pursuit of a viable claim for injunctive relief, the imposition of civil penalties payable to the Treasury does not give a citizen plaintiff a sufficient personal stake for Article III purposes. Having relinquished their claim for equitable relief, the Petitioners' appeal of the district court's civil penalty ruling was not for the vindication of their own rights, but rather for "vindication of the rule of law -- the 'undifferentiated public interest' in faithful execution'" of the Clean Water Act. *Id.* at 1018 (quoting *Lujan*, 504 U.S. at 577). *See also Maine v. Taylor*, 477 U.S.

131, 137 (1986) (private parties have no judicially cognizable interest in the prosecution of another); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (private parties have no judicially cognizable interest in obtaining administrative enforcement of the law). Simply put, Petitioners' desire to see a larger civil penalty imposed on Laidlaw simply fails to meet Article III's justiciability requirements, and the Fourth Circuit correctly decided that Petitioners' case was moot.

II. Alternatively, FOE's Case Was Mooted By Laidlaw's Voluntary Cessation Of Permit Exceedances, Because There Is No Reasonable Expectation That Such Exceedances Will Recur, And Any Effects Of The Exceedances Have Been Completely Eradicated

As demonstrated above, FOE's relinquishment of its claim for equitable relief mooted this case. However, instead of properly focusing on the decisive effect of FOE's own actions in mooting the case, FOE (and supporting *amici*) mistakenly emphasize the "voluntary cessation" case law exemplified by *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), and on that basis contend that Laidlaw's good faith actions in achieving post-complaint compliance do not moot this case. *See, e.g.*, Pet'r Br. at 32-35; Gov't Br. at 17-19. Contrary to those arguments, the actions taken by Laidlaw provide a sound alternative basis for concluding that this case is moot.

Amici of course recognize that "voluntary cessation of allegedly illegal conduct" does not of its own force moot a case. *W.T. Grant Co.*, 345 U.S. at 632. A case will, however, be moot if (i) it can be "said with assurance" that there is no reasonable expectation that the "alleged violation will recur" and (ii) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." *Ibid.* Both conditions are met in this case.

There is no reasonable expectation that Laidlaw will again be in violation of its discharge permit.[9] As explained in detail by the district court, the vast majority of the permit violations of which Petitioners complained occurred before suit was filed, and Laidlaw was already vigorously pursuing steps in coordination with DHEC to address the level of mercury in the Roebuck facility's wastewater discharges at the time that the statutorily-required notice of intent to sue was given. In fact, within less than a week of the filing of this suit, and continuing for more than six years thereafter (until Laidlaw permanently closed the Roebuck facility), there were no discharges of mercury in excess of the 10 ppb daily maximum limit that was finally established for the facility.[10] In short, given the fact that for more than six years Laidlaw consistently achieved the 10 ppb daily maximum limit (a limit seven times *less* stringent than the incorrect and "draconian" limit previously in effect), there was certainly "no reasonable expectation" that violations would recur. *W.T. Grant Co.*, 345 U.S. at 633.

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[9] Of course, now that Laidlaw has permanently closed the Roebuck facility and removed or sold its incineration equipment, that reasonable expectation is an absolute certainty. See Respondent's Suggestion of Mootness, Case No. 98-822, at 4 (June 9, 1999); see also supra note 2.

[10] According to the district court, there were 14 exceedances of the "old" maximum daily mercury limit of 1.3 ppb on or after June 12, 1992, the day Petitioners filed suit. J.A. 195. As the district court recounted, the 1.3 ppb permit limit was calculated incorrectly and eventually changed to 10 ppb to remedy the error. J.A. 148-49. In determining whether a case is moot, courts should retroactively apply administrative rulings in effect at the time of decision-making on appeal. *See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 661 n.1 (1989). This is fully consistent with the principle that an NPDES permit condition cannot be challenged in an enforcement proceeding. *See* 33 U.S.C. § 1369(b)(2). That is because the issue for purposes of determining mootness is not whether the actions of the permittee at a previous point in time would have constituted a permit violation, but whether due to intervening events the parties no longer have a cognizable interest in the outcome.

Likewise, the effects of Laidlaw's violations, assuming that there were any effects, have been completely and irrevocably eradicated. As the district court found

> Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, produced no direct environmental impact. There has been no demonstrated proof of harm to the environment.
>
> . . . .
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> . . . [N]o fish in [the North Tyger] river has a mercury level even one-quarter of a limit that is ten times lower than necessary to protect human health. This test result, considered together with the nine years of acute and chronic toxicity testing data as to the effect of Laidlaw's total effluent on all other aspects of the stream, leads the court to conclude that Laidlaw's effluent, even with the permit exceedances it has experienced, has had no demonstrated adverse affect on the environment.

J.A. 162, 164. Thus, the second condition for mootness is clearly met as well. Indeed, Laidlaw caused no injury and there were no effects that needed to be redressed.[11]

Laidlaw's conformity with the standard for mootness enunciated in *Davis* is readily demonstrated by comparing Laidlaw's actions to those of the defendants in the "voluntary compliance" cases. Here, Laidlaw's actions to address its mercury discharges were well underway prior to FOE's complaint, and thus were taken independent of, and without regard to, FOE's lawsuit. In contrast, where the Court has concluded that voluntary cessation of a defendant's actions

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[11] The district court's finding that there was no harm to the environment provides another basis for concluding that Petitioners' claims are not justiciable. *See, e.g., Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 120-23 (3d Cir. 1997) (case not justiciable without injury in fact).

did not moot a case, the facts demonstrated post-suit cessation only, significant possibilities for backsliding, and/or cosmetic changes or only partial reform. *See, e.g., W.T. Grant Co.*, 345 U.S. at 634 (defendant had previously refused to terminate the illegal actions at issue -- interlocking directorates -- "despite five years of administrative attempts to persuade him of their illegality," and defendant would not commit to avoiding similar violations in the future); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982) (city's repeal of objectionable ordinance did not preclude it from reenacting precisely the same provision if judgment were vacated, and city had announced just such an intention); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (in antitrust injunction action against association as well as its individual members, mere fact of dissolution of the association and statement that it was uneconomical to resume the conduct at issue was insufficient to satisfy mootness burden).

In sharp contrast to the cases discussed above are cases which the Court found moot based on voluntary compliance. In those cases, the Court relied on the defendant's good faith efforts to comply, the permanence of the changes made to achieve compliance, the history of compliance (or attempted compliance) prior to suit and/or consistent compliance thereafter. *See, e.g., Davis*, 440 U.S. at 631-33 (fire department's good faith efforts at revamping hiring practices so as to address past discrimination indicated past practices would not recur despite district court's finding of necessity for injunction and fact that remedial measures post-dated commencement of litigation); *SEC v. Medical Comm. for Civil Rights*, 404 U.S. 403, 406 (1972) (where defendant corporation declined to include disputed shareholder proposal in proxy statement until after suit was brought, fact that proposal ultimately garnered little shareholder support led Court to speculate that corporation would in the future include proposal in its proxy statements, rather than repeat litigation, thereby mooting case). *Cf. Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 68, 72 (1983) (per curiam) (Court

determined that case was moot because there was no reasonable likelihood that university, having reversed position that gave rise to controversy, would later change its mind).

The factual similarities between the cases discussed immediately above and this case are thoroughly demonstrated in the record, and "voluntary cessation" moots Petitioners' claims. More specifically, long before receiving Petitioners' pre-suit notice letter, Laidlaw was well on its way to achieving compliance, having installed additional pollution control equipment in close coordination with the responsible state agency; compliance was achieved shortly after suit was brought and was consistently maintained for over six years; and most of the discharge violations were the result of an excessively restrictive permit limit that was technologically impossible to meet consistently, and which was subsequently corrected. The Court, accordingly, should conclude that Laidlaw met its burden of demonstrating mootness through its own successful actions to achieve compliance, as those actions "did not consist merely of pretensions or promises but [were] overt and visible [efforts] carried out by extensive operations which [had] every appearance of being permanent," and "[t]he record discloses no threat or probability of resumption" of the disputed actions. *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 334 (1952).

In sum, Laidlaw's voluntary efforts in achieving compliance provide a sound alternative basis for affirming the court of appeals' judgment.[12]

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[12] Citing *Vitek v. Jones*, 436 U.S. 407, 410 (1978), and *McLeod v. General Electric Co.*, 385 U.S. 533, 535 (1967), the United States suggests that if Laidlaw's voluntary compliance eliminated any reasonable prospect of future violations, the proper course was for the Fourth Circuit to remand the case to the district court for consideration of mootness. Gov't Br. at 22. Both *Vitek* and *McLeod* addressed new developments that potentially mooted the case, but which the courts below had not had the opportunity to consider. That is not the situation here, as the facts that moot this case -- Laidlaw's permanent compliance -- were extremely well developed on the record before the district court. In such circumstances, it

III. Contrary To FOE's Contentions, The Finding Of Mootness In This Case Will Advance The Policies Underlying The Clean Water Act

Petitioners also contend that declaring this case moot will conflict with the congressional policies underlying the Clean Water Act. Pet'r Br. at 35-40. To the contrary, the determination of mootness in this case supports those policies, and Petitioners' opposing arguments are unsound.

First, Petitioners set up a strawman, suggesting that the court of appeals' mootness determination means that "civil penalties cannot be imposed for any violations as long as the defendant comes into compliance some time during the pendency of the case." *Id.* at 38. To the contrary, this case is moot because Laidlaw achieved, through good faith efforts, a permanent state of compliance, which was demonstrated over an extended period, and neither Respondent nor *amici* suggest in any way that mootness occurs simply by "com[ing] into compliance some time during the pendency of the case." *Ibid.* Moreover, although Petitioners argue that Respondent's (and *amici*'s) position gives "the defendant . . . every incentive to continue its noncompliance," *ibid.*, in fact just the opposite incentive is created. Thus, the more promptly the defendant implements the measures necessary to eliminate the cause of violations, the greater the likelihood that a case will be moot or, if the case is not moot, that the defendant will succeed in mitigating its civil penalty exposure. The "Russian roulette" strategy that Petitioners attribute to NPDES permittees -- choosing to prolong noncompliance -- is irrational.

Petitioners also make the flawed argument that the court of appeals' ruling will create a disincentive for plaintiffs to bring suits under section 505, which are "'often initiate[d] . . .

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is entirely appropriate for the Court to consider whether Laidlaw's documented, long-term compliance mooted the case. *See, e.g., Davis*, 440 U.S. at 634 (Court found defendant's voluntary actions mooted the case, even though lower courts apparently had not addressed the issue).

to ensure that penalties are imposed.'" *Id.* at 39 (quoting *ASLF v. Pan American Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993)). In considering this argument, it bears emphasis that section 505 was "expressly modeled" after the citizen suit provision in section 304 of the Clean Air Act, 42 U.S.C. § 7604. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981). Under both statutes the trial court could issue an enforcement order or injunction. While section 505 added authority (which was then absent from section 304) for the court to supplement its injunction with civil penalties, section 505 reflected "no change in purpose" from section 304. *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1092-93 (1st Cir. 1986). Legislative history shows that section 505 was "carefully restricted" to the same types of actions as section 304, *see* S. Rep. No. 92-414 (1971), *reprinted in* 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972* (CWA Leg. Hist.) at 1497 (1973) -- that is, to abatement or injunction actions; "successful abatement" is, of course, the intended "result of a citizen proceeding." S. Rep. No. 92-414 at 81, 2 CWA Leg. Hist. at 1499. In short, section 505 is fundamentally an injunctive remedy and is not intended, as Petitioners argue, "to ensure that penalties are imposed." Nothing in the court of appeals' decision detracts from the purpose Congress intended.[11]

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[11] The injunction remedy of section 304 of the Clean Air Act was later supplemented with civil penalties. *See* Pub. L. No. 101-59, § 304, 104 Stat. 2399, 2576-77 (1990) (codified as amended at 42 U.S.C. § 7604).

Petitioners further contend that affirmance here would encourage defendants in other citizen suits to engage in dilatory litigation tactics in order to "buy time" to come into compliance, and thereby increase their chances of avoiding the imposition of civil penalties. Pet'r Br. at 38. If citizen plaintiffs find themselves confronted with unjustified, dilatory litigation tactics, they have the full arsenal of remedies available to every civil litigant in federal court. *See, e.g.*, Fed. R. Civ. P. 11 (addressing frivolous pleadings and motions practice); 16(b) (addressing scheduling of litigation, including time limits on motions and discovery); and 37 (providing sanctions for discovery abuse).

Aside from offering invalid policy arguments, Petitioners fail to consider the policy consequences of allowing a citizen suit to proceed under the circumstances of this case. As the district court emphasized, faced with the extremely difficult task of attempting to meet the 1.3 ppb mercury limit, Laidlaw would have been justified at several points in abandoning that effort and seeking a less stringent mercury limit under the 1987 permit's reopener clause. *See* J.A. 177-78. This is similar to the hypothetical the Court described in *Gwaltney*, in which an NPDES permittee, as part of the resolution of an enforcement process, agreed to

> take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities.

484 U.S. at 61. In this case, Laidlaw would have been fully justified, as any NPDES permittee in Laidlaw's position would have been, in pursuing the reopener clause of the 1987 permit and, if necessary, challenging an insufficient response by DHEC. That would have been especially true if at the time Laidlaw had already been confronting the specter of FOE's entirely duplicative citizen suit. But as the district court

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Finally, Petitioners complain that, if the Court were to affirm, citizen plaintiffs would have a "to appeal every denial of injunctive relief" in order to keep civil penalty claims alive on appeal. Pet'r Br. at 39. Contrary to Petitioners' implication, the Fourth Circuit's decision does not encourage unnecessary appeals of orders denying injunctive relief. Instead the court of appeals' decision simply recognizes that a civil penalty-only appeal loses its character as a justiciable case-or-controversy where the one form of relief that provides the plaintiff's requisite personal stake is relinquished.

emphasized, "[i]nstead, Laidlaw elected the more difficult and costly path: install the technology in an attempt to meet the 1.3 ppb limit." J.A. 177. And just as in the *Gwaltney* hypothetical, the environment benefited from Laidlaw's choice because

> for the foreseeable future [Laidlaw was required to] comply with a mercury limit that [was] determined in part by the fact that it ha[d] purchased the technology to achieve an unusually restrictive limit. The limit ordinarily would have been much higher.

J.A. 178-79. Put another way, what public policy is achieved by penalizing a permit holder for failing to meet unattainable standards? The answer is, of course, none. Laidlaw pursued cutting-edge pollution control in a vigorous effort to achieve extremely stringent standards. To allow suits like FOE's under these circumstances will only serve to discourage such initiative.

Finally, throughout the difficult process of attempting to achieve compliance with the 1.3 ppb limit, Laidlaw kept DHEC apprised of all efforts to achieve compliance, including review and approval of each of the studies, recommendations, and wastewater treatment system modifications Laidlaw made to achieve compliance with its permit. *See* J.A. 174. Allowing Petitioners to maintain their entirely duplicative enforcement action in such circumstances disregards this Court's admonition that states have primary authority and discretion to enforce the Clean Water Act. *See Gwaltney*, 484 U.S. at 60-61. NPDES permittees in Laidlaw's position will not agree to the extreme corrective measures that Laidlaw pursued if they will nevertheless face the specter of a duplicative citizen suit that rides the coattails of comprehensive state enforcement. *See Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 383 (8th Cir. 1994) (allowing duplicative citizen suit "despite a state's diligent efforts at administrative enforcement, could result in undue interference with, or unnecessary duplication of, the legitimate efforts of the state agency. We believe that such a

result would undermine, rather than promote, the goals of the [Clean Water Act], and is not the intent of Congress"). In short, as explained in *North & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991):

> Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further [that] goal. They are, in fact, impediments to environmental remedy efforts.

CONCLUSION

In view of the foregoing, *amici curiae* Alliance of Automobile Manufacturers, *et al.*, respectfully urge the Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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